STATE OF MICHIGAN

COURT OF APPEALS

LEE D. BUTLER,

Plaintiff-Appellee,

v

BALAL, INC.,

Defendant-Appellant.

UNPUBLISHED
November 21, 2006

No. 266113
Genesee Circuit Court
LC No. 05-080833-NO

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

In this slip and fall case, defendant Balal, Inc. (Balal) appeals by leave granted two trial court orders: an order denying its motion to strike plaintiff Lee Butler's expert witnesses' testimony relating to a polygraph test and an order denying Balal's motion for summary disposition. We reverse.

I. Basic Facts And Procedural History

Butler alleged that at approximately 5:00 a.m. on February 27, 2004, he stopped at Balal's gas station and convenience store to purchase gasoline and cigarettes. Butler recalled that the weather was cold but that it was not snowing. And, although he did not consider the gas station to be well lit, Butler admitted that the lights in the store and above the gas pumps were illuminated. According to Butler, after paying for his purchases, he exited the store, stepped down off the small, porch-like area located in front of the store's main entrance, and then slipped and fell on "clear" ice located on the pavement below. Even though Butler claimed that he "was looking where [he] was going," he asserted that the ice on the pavement was not visible on casual inspection and that he did not realize that it was ice until after he had fallen. Butler allegedly broke his right ankle in the fall.

An employee of Balal's denied that the store was even open for business at the time Butler supposedly fell. Two people who were allegedly with Butler at the time and supposedly saw him fall were incarcerated or otherwise unavailable; thus, in support of his version of events, Butler underwent a polygraph examination administered by expert polygraph examiner H. John Wognaroski, III. According to Wognaroski, the polygraph showed that Butler truthfully answered that he had purchased gas from Balal's store on February 27, 2004, that he was not making a false claim about buying gas just prior to injuring his ankle, and that he was not lying about injuring his ankle in Balal's parking lot just after paying for the gas.

Balal moved to strike Wognaroski, as well as polygraph expert Lynn P. Marcy, from Butler's witness list, arguing that polygraphs have not been recognized as reliable scientific evidence and are not admissible in evidence. Butler argued that, unlike a jury, there was no danger that the trial judge, sitting as a trier of fact, would give undue weight to the polygraph results, so it was safe to admit them into evidence as additional evidence of witness credibility. The circuit court agreed with Butler's argument, noting that it would strike polygraph evidence from a jury trial but that there did not seem to be any reason to strike it from a bench trial. But the circuit court informed counsel that he was highly suspicious of polygraph tests, believing that they are inherently unreliable. Thereafter, the circuit court entered its order denying Balal's motion to strike the witnesses' testimony relating to the polygraph examination.

Balal then moved for summary disposition of Butler's complaint under MCR 2.116(C)(10), arguing that the ice on which Butler allegedly slipped was an open and obvious condition that did not present a unique risk of harm. Balal relied on the Michigan Supreme Court's order in *Kenny v Kaatz Funeral Home*.[1] The circuit court found the circumstances in the instant matter distinguishable from the *Kenny* case, where additional facts showed that the plaintiff should have been aware of slippery pavement. Specifically, the circuit court noted that it was not snowing in this case. The circuit court found that any danger presented was not open and obvious, and denied Balal's motion.

II. Motion To Strike Witness

A. Standard Of Review

We review for an abuse of discretion a trial court's decision to admit evidence.[2]

B. Admissibility Of Polygraph Testing

It is a well-established "bright-line rule" that the results of polygraph tests are not admissible as evidence at trial because polygraph testing has not received the degree of scientific acceptance or reliability that would permit the admission of such evidence.[3] Polygraph test

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[1] *Kenny v Kaatz Funeral Home* (*Kenny II*), 472 Mich 929; 697 NW2d 526 (2005) (adopting Griffin, J., dissent from *Kenny v Kaatz Funeral Home* [*Kenny I*], 264 Mich App 99; 689 NW2d 737 [2004]).

[2] *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

[3] *People v Jones*, 468 Mich 345, 351, 355; 662 NW2d 376 (2003); *People v Ray*, 431 Mich 260, 265, 268; 430 NW2d 626 (1988); *People v Barbara*, 400 Mich 352, 377; 255 NW2d 171 (1977); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000).

evidence is inadmissible during both criminal and civil trials.[4] And this exclusion applies to both jury[5] and bench trials.[6]

Butler relies on *People v McKinney*[7] to support the admission of his polygraph results, but we find that case distinguishable because it dealt with the admission of polygraph examination results during a motion to suppress allegedly illegally seized evidence in a criminal case. Drawing on rationale from the Michigan Supreme Court,[8] this Court held that polygraph evidence is admissible during the preliminary stages of trial that deal with legal questions that do not directly bear on the ultimate question of the defendant's guilt or innocence.[9] Thus, the phases of a trial that do not bear on the defendant's guilt or innocence, the bright-line rule barring the admission of polygraphs during trial remains constant.

The "exclusion at trial of polygraph results rests upon the judicial estimate that the trier of fact will give disproportionate weight to the results and consider the evidence as conclusive proof of guilt or innocence."[10] Despite this, Butler argues that there is not harm in admitting polygraph evidence during a bench trial because, unlike a jury, there is no danger that the trial judge, sitting as a trier of fact, would give undue weight to the polygraph results. We acknowledge that a trial court possesses an understanding of the law that allows it to understand the difference between admissible or inadmissible evidence and decide a case based solely on properly admitted evidence.[11] But this ability does not negate evidentiary errors, and the trial court is obligated to ignore any inappropriately admitted evidence. Accordingly, we conclude that the circuit court erred by denying Balal's motion to strike Butler's expert witness testimony regarding the polygraph testing.

III. Motion For Summary Disposition

A. Standard Of Review

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to

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[4] *Barbara*, *supra* at 364; *People v Davis*, 343 Mich 348, 370; 72 NW2d 269 (1955); *Michigan State Employees Assoc v Michigan Civil Service Comm'n*, 126 Mich App 797, 805; 338 NW2d 220 (1983).

[5] *Nash*, *supra* at 97.

[6] See *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

[7] *People v McKinney*, 137 Mich App 110; 357 NW2d 825 (1984).

[8] See *Barbara*, *supra* at 411-414 (holding that polygraph evidence may be admitted during a motion for new trial).

[9] *McKinney*, *supra* at 114-115.

[10] *Ray*, *supra* at 265.

[11] *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001); *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[12] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[13] We review de novo the trial court's ruling on a motion for summary disposition.[14]

B. Open And Obvious

A premises liability claim requires that a plaintiff prove the following four elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages.[15] Whether a defendant owed a plaintiff a duty of care is a threshold question of law for the trial court to decide.[16] As a rule, a premises owner owes business invitees a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, this duty does not generally extend to open and obvious dangers.[17] "'[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate harm despite knowledge of it on behalf of the invitee.'"[18] When determining if a condition is open and obvious, we consider whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection."[19]

This Court's majority opinion in *Kenny I* held that slippery snow-covered ice was not necessarily an open and obvious danger and that, even if it was open and obvious, special aspects existed that rendered it unreasonably dangerous.[20] Judge Griffin rejected these holdings, pointing out that snow and ice are common occurrences during a Michigan winter and that the slip hazard posed by snow or ice is open and obvious, generally posing no special aspects that render it unreasonably dangerous.[21] In *Kenny II* the Michigan Supreme Court reversed this Court's decision for the reasons stated in Judge Griffin's dissenting opinion. And since reversing this Court's decision in *Kenny I*, the Supreme Court has repeatedly cited its order in *Kenny II* as the basis for reversing Court of Appeals decisions where this Court has found that a

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[12] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[13] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[14] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[15] *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

[16] *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992).

[17] *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

[18] *Id*., quoting *Riddle*, *supra* at 96.

[19] *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993).

[20] *Kenny I*, *supra* at 112-113.

[21] *Id*. at 119-120, 121 (Griffin, J., dissenting).

slip hazard posed by ice was not open and obvious.[22] Indeed, on remand to this Court in *Ververis v Hartfield Lanes*, this Court interpreted Judge Griffin's dissent and the other recent Supreme Court orders to hold, "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery."[23]

Notably, here, however, the circuit court found it significant that no precipitation was recorded on the day of Butler's alleged slip and fall. But as Balal contends, we conclude that the absence of snowfall is a red herring. Despite the facts in *Kenny*, Judge Griffin's rationale did not hinge on the presence of snow covering the ice. In fact, in *Ververis*, this Court noted that its "holding regarding a snow-covered surface is an extension of precedents already recognizing that an icy surface presents an open and obvious danger."[24] The presence of snow cover or snowfall is not the material marker for imputing reasonable awareness of icy conditions. Rather, it is the common knowledge that the cold climate during Michigan's winter months is conducive to the formation of ice on the ground. Balal submitted a climatological report that indicated that the average temperature on February 27, 2004, was thirty-three degrees Fahrenheit. The average temperature on the day before was thirty-one degrees Fahrenheit. The low temperature on both days was twenty-one degrees Fahrenheit. Given these cold temperatures, we conclude that an average person would have reasonably expected the danger of ice in the parking lot.

We further note that Butler has not shown that he was forced to take the path he used to exit the store in order to avoid some other harm.[25] Nor has he shown that the ice posed a severe risk of harm.[26] But the evidence did show that Balal's employee took reasonable steps to prevent injury by salting the area where Butler fell. Accordingly, we conclude that the circuit court erred by finding that the icy walkway was not an open and obvious danger.

Reversed and remanded for entry of an order granting summary disposition in Balal's favor. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen

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[22] See *Ververis v Hartfield Lanes*, 474 Mich 954; 706 NW2d 743 (2005); *Schultz v Henry Ford Health System*, 474 Mich 948; 706 NW2d 203 (2005); *Morgan v LaRoy*, 474 Mich 917; 705 NW2d 685 (2005); *D'Agostini v Clinton Grove*, 474 Mich 876; 704 NW2d 76 (2005).

[23] *Ververis v Hartfield Lanes* (*On Remand*), 271 Mich App 61, 67; 718 NW2d 382 (2006).

[24] *Id*. at 67 n 2, citing *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002).

[25] *Lugo, supra* at 519.

[26] *Id*.